**In the High Court of Punjab and Haryana at Chandigarh**

**C.R. No. 2314 of 2001**
**Date of decision:14-09-2006**

Nini Kumar Jain .....Petitioner

Versus

smt. Neena Devi and others .....Respondents

**CORAM: Hon'ble Mr.Justice Vinod K.Sharma**

**Present: Mr.Arun Jain, Advocate, for the petitioner.**
**Mr. Arun Bakshi, Advocate, for respondent No.1.**

**VINOD K.SHARMA,J. (ORAL)**

The present revision petition has been filed against the order dated 07-03-2001 passed by the learned Civil Judge (Jr.Divn.), Jalandhar, vide which the application moved by respondent No.1 herein under Order 8 Rule 6-C of Civil Procedure Code for exclusion of counter claim dated 4-01-1999 has been allowed.

The case set up in the application was that the case was fixed for defence evidence, when the petitioner-defendant No.1 moved counter claim for specific performance of agreement dated 12-11-1985. It was alleged in the application that the counter claim could not be entertained at this stage as it did not comply with the ingredients of Order 8 Rule 6-C CPC for making the counter claim at the first stage i.e. at the time of filing of written statement. It was further alleged in the application that as per the stand of the petitioner defendant No.1, the agreement to sell was dated 12-11-1985 whereas the counter claim for specific performance of agreement to sell was filed on 4-01-1999 which is clearly time barred and the same could not be

entertained at this belated stage. It was also submitted that the defendant-petitioner had an independent right to file a separate suit for specific performance on the basis of alleged agreement to sell, but no counter claim can be filed in the suit of the plaintiff-respondent at this belated stage. On these averments, the dismissal of the counter claim filed by the defendant-petitioner was prayed for.

In the reply filed by the petitioner, the petitioner took preliminary objections that the application is not maintainable in the present form. Further that the plaintiff- respondent had filed this application just to harass the answering defendant-petitioner. On merit the stand taken was that the counter claim has been filed by the petitioner herein for specific performance not only of agreement to sell dated 12-11-1985,but also of all subsequent commitments and assurance given by the plaintiff-respondent to the petitioner. It was further submitted that the counter claim could be filed at any stage and that the counter claim was within time and was complete in all respects. It was also pleaded that the counter claim has become necessary for proper adjudication of the matter in dispute on merits. The other ground taken by the petitioner was that the said counter claim was filed to avoid multiplicity of litigation and to save valuable money of both the parties as well as the valuable time of judicial system. It was also pleaded that the plaintiff-respondent from the very beginning had played a dual role, one in the Court and the the other outside the Court.

The case of the petitioner was that the plaintiff-respondent had assured the petitioner that the suit filed was an eye-wash and to dodge the Income Tax Authorities. It was further pleaded that the plea of limitation

can only be seen at the time of arguments and prayed that the application be dismissed.

The learned trial Court allowed the application by holding that the alleged agreement to sell was dated 12-11-1985 and as the counter claim in the shape of specific performance of agreement was filed on 4-01-1999, which was clearly barred by time. The learned Court below further held that the petitioner herein wanted to make a counter claim of alleged agreement to sell dated 12-11-1985 which was in the knowledge of the petitioner, but in the written statement, no mention or reference of the same was was made.

The learned trial Court further held that under Order 8 Rule 6 (A) (1) of the CPC, a counter claim can be set up even after filing of the written statement provided the cause of action had accrued to the defendant-before the defendant had delivered his defence or before time limit after delivering his defence has expired where such counter claim is in the nature of the claim for damage or not under Article 113 of the Limitation Act. The learned Court below also held that as the period of 3 years is provided under Article 113 of the Limitation Act, the counter claim, therefore, was hopelessly barred by time. The other ground for rejection was that no explanation has been given for delay in filing the counter claim. On the basis of these findings, the application filed by the plaintiff-respondent was allowed.

Mr. Arun Jain, learned counsel appearing for the petitioner has challenged the order firstly on the ground that the learned trial Court has misread the facts of the case in recording a finding that no mention of the agreement dated 12-11-1985 was made in the written statement. I have gone

though the written statement and find that the observations made by the learned trial Court are outcome of misreading of the written statement as the very first preliminary objection in the written statement was that the suit was not maintainable and the plaintiff-respondent has concealed the factum of agreement to sell as well as the receipt of payment.

The next contention of the learned counsel for the petitioner was that it was not open to the trial Court to exercise the powers under Order 8 Rule 6-C of the CPC on the ground of limitation as the question of limitation is a mixed question of law and facts and it was yet to be proved by leading evidence by both the parties whether counter claim was within limitation or not. The learned counsel referred to the averments with regard to cause of action made in the counter-claim which read as under:-

> "The cause of action further arose to defendant No.1 on 10.1.1996 when the defendant No.1 appeared in the Court of Shri T.C.Mangla, Civil Judge (Jr.Divn.), Jalandhar in the case captioned 'Neena Devi Versus Nini Kumar Jain' and got the copy of the plaint in which she has suppressed the agreement to sale and concocted a false and frivolous story of licencing to the defendant No.1 without any consideration. On 10.1.1996 the defendant No.1 first time came to know about the bad intention of the plaintiff qua the agreement to sale. The cause of action arose to the defendant No.1 on all the dates when defendant appeared in the Court and further on all the dates when plaintiff during pendency of the suit made assurances that she would withdraw the suit. Further Cause of Action arose to the defendant No.1 when plaintiff himself appeared in Witness Box and statement which amounts to the denial of the Agreement dated 12.11.1985 executed on her behalf by her attorney on 13.11.85 and approved by her counsel Shri Ravi Nanda Advocate who was the luminary of Jalandhar Bar and

Senior Advocate of Punjab and Haryana High Court having a practice of more than 30 years at his credit. The statement so given also amounts to refusal of the execution of the Sale Deed and registration in favour of defendant No.1 Further she admitted all the payments in her letter written to Shri P.C. Thaper the property dealer through whom the deal was negotiated. The Cause of Action further arose to defendant No.1 in December, 1997 when Shri Krishan Sharan Gupta and defendant No.1 alongwith his father met plaintiff and plaintiff assured them to withdraw all suits filed by her due to Income Tax purposes. The Cause of Action arose to defendant No.1 when plaintiff got dismissed a suit captioned Smt. Neena Devi Vs. Nini Kumar Jain and Punjab State Electricity Board in the Court of Shri A.L.Khichi, Addl. Civil Judge, Jalandhar on 21.1.98. The Cause of Action further arose to the defendant No.1 when in the second week of March, 1998 plaintiff filed another suit of permanent injunction captioned Neena Devi Vs. Nini Kumar Jain in the Court of Shri R.K.Jain, civil Judge (Jr. Divn.) Jalandhar which is still pending the Court of Shri Sangeet Pal Singh, Civil Judge, Jr, Divn., Jalandhar. Next Date of hearing in that suit is 7.1.1999. The Cause of Action is still continuous and alive as the defendant No.1 has performed his part of the contract by paying the full consideration as mentioned in this counter claim in earlier paras and plaintiff has performed in compliance to the Agreement of Sale dated 12.11.1985 executed on 13.1185, performed part performance of the same by delivering the actual physical possession of the property and machinery installed therein and the defendant no.1. is in possession of the same under the agreement and has also sold certain portion of the property to the knowledge of the plaintiff, but she never made any objection but in fact recognised the rights of the defendant as owner because she received the full consideration of the property and delivered the possession. Only thing remains execution of the sale deed and

registration thereof for which she is bound to do so after obtaining the necessary permission from the Income Tax Department and other authorities as required under the law. In fact she deliberately failed to perform her part of the contract in spite of the fact she received the full consideration and delivered the possession under the contract. She is also debarred from interfering in the possession of defendant No.1 in any way. Her interference in the possession of the defendant No.1 gives a fresh Cause of Action on every occasion when she comes to the Court under various false and frivolous suits to wriggle out from the contract of Sale."

The contention of the learned counsel for the petitioner, therefore was that for purposes of forming an opinion on the question of limitation, averments made in the counter claim, as it is, were to be seen.

The learned counsel for the petitioner also argued that it is clearly mentioned in the counter claim that the cause of action had accrued to the petitioner on 10-1-1996 when the alleged refusal was attributed to him though in fact the petitioner had been supplied a copy of the plaint on 30-1-1996 when he appeared in the Court. The contention of the learned counsel for the petitioner was that the cause of action had accrued on 10-1-1996 whereas the written statement was filed on 12-3-1996. Thus, the cause of action had accrued to the petitioner before filing of the written statement and further the same having been filed within a period of three years, therefore, was to be treated to have been filed within the period of limitation and in support of this contention, he placed reliance on the judgment of the Hon'ble Supreme Court in **Mahendra Kumar and another Vs. State of Madhya Pradesh and others, AIR 1987**

**SC 1395.** Para 15 of this judgment reads as under:-

> " The next point that remains to be considered is whether R.6A (1) of O.VIII, Civil P.C. bars the filing of a counter-claim after filing of a written statement. This point need not detain us long, for R 6A(1) does not, on the fact of it, bar the filing of counter claim by the defendant after he had filed the written statement. What is laid down under R. 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering has expired, whether such counter claim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of R 6A(1) in holding that as the appellants had filed the counter claim after the filing of the written statement, the counter claim was not maintainable. The finding of the High Court does not get any support from R 6A (1), Civil PC. As the cause of action for the counter-claim had arisen before the filing of the written statement, the counter claim was, therefore, quite maintainable. Under Art. 113, Limitation Act, 1963, the period of limitation of three years from the date right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter claim, which is treated as a suit under S.3(2) (b), Limitation Act has been filed within three years from the date of accrual to them of the right to sue. The learned District Judge and the High Court were wrong in dismissing the counter claim."

The contention of the learned counsel for the petitioner is that his case is squarely covered by the said judgment. In support of his contention that the cause of action had arisen to the petitioner on 10-1-1996, he places reliance on the judgment of the Hon'ble Andhra Pradesh High

Court in **Parnam Balaji and another Vs.B. Venkatramayya and another, AIR 1988 A.P 250,** wherein it has been laid down that when a purchaser is put in possession of the property on giving advance, then the cause of action only accrues when the contract is said to be repudiated.

On the other hand, Mr. Arun Bakshi, learned Counsel appearing for respondent No.1 in support of the impugned order passed by the learned trial Court, places reliance on the judgment of this Court in the case of **Punjab State Electricity Board, Patiala Vs. Punjab Pre-Stressed Concrete Ltd., 1996 (3) RCR (Civil) 24** to contend that the counter claim can be filed at the first instance or in the written statement itself and it was not open to the petitioner to make his counter-claim at any stage. The contention of the learned counsel for the respondent was that after the plaintiff had led her evidence, it was not open to the petitioner to file the counter-claim. The judgment relied upon the by the respondent nowhere lays down that no counter can be filed after the evidence was led by the plaintiff. In the said case, the counter claim was disallowed by an Arbitrator and the dispute before the Court was whether it amounted to misconduct. It was in that context that these observations were made. In any case, in view of the authoritative pronouncement of the Hon'ble Supreme Court in **Mahendera Kumar's case (supra),** no reliance can be placed on the judgment of this Court relied upon by the learned counsel for the respondent.

I have heard the learned counsel for the parties and find that in the present case the claim of the petitioner is fully covered by the judgment of the Hon'ble Supreme Court in **Mahendera Kumar's case (supra)** as the

cause of action as per averments made in the counter-claim, had accrued to the petitioner prior to filing of the written statement and the same was filed within three years from the date when cause of action accrued to the petitioner. The question as to when the cause of action arose would be a subject matter to be decided on merit by the Court after the parties have led their evidence. The finding of the trial Court that no counter-claim could be filed after the parties had led their evidence or that the suit was prima facie barred by limitation, cannot be sustained in view of the specific averments about the cause of action having been made in the counter-claim. I agree with the contentions raised by the learned counsel for the petitioner.

Accordingly, I allow the revision petition, set aside the impugned order and direct that the counter-claim filed by the petitioner be taken on record. The trial Court is directed to proceed with the matter in accordance with law.

**14-09-2006** **(VINOD K.SHARMA)**
**'dls'** **JUDGE**